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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 511

JAMES E. BUSH,

Petitioner;

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

WAGGONER CARR
Attorney General of Texas

SAM R. WILSON
Assistant Attorney General

ALLO B. CROW, JR.
Assistant Attorney General

LINWARD SHIVERS
Assistant Attorney General
Capitol Station
Austin, Texas

BRUCE ALLEN
County Attorney
Ellis County
Waxahachie, Texas
Attorneys for Respondent

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JURISDICTION

Although the facts set forth in the jurisdictional statement in Petitioner's brief are true, the Respondent denies that there is a substantial federal question presented for review by this Honorable Court.

QUESTION PRESENTED

In a criminal prosecution of an indigent defendant previously adjudicated to be insane, does the 14th Amendment prohibit the State trial court from finding the Defendant sane based on the testimony of a medical doctor and a number of lay witnesses?

STATEMENT OF THE CASE

Respondent denies every assertion of fact in Peti-

tioner's brief except those specifically admitted herein or supported by the record.

This is a State criminal case in which the Petitioner was convicted of felony theft, habitual criminal in the District Court of Ellis County, Texas. The evidence at the trial showed that Petitioner stole a collection of old coins worth about $600 from his employer (R 93). The jury found that Petitioner had been twice previously convicted of felony offenses less than capital and, therefore, he was sentenced to life imprisonment, the mandatory sentence under Texas law (R 17-19)

The pertinent history of Petitioner begins on October 26, 1923, when he was indicted by the grand jury of Navarro County, Texas, on three separate indictments, one charging theft of a bale of cotton of the value of One Hundred ($100) Dollars; one charging theft of an automobile, and one charging theft of a truck (R 79-87). Before he could be brought to trial on those indictments he was brought before the County Court of Navarro County, Texas, on an inquiry of lunacy and, on February 14, 1924, was found to be of unsound mind as the result of an attack of lunacy of approximately six months duration (R 149). Subsequent to this adjudication of lunacy Petitioner was apparently sent to the Terrell State Hospital for some period of time and subsequently discharged therefrom (R 51; "Appendix A" Respondent's brief in opposition to Petitioner's Application for Writ of Certiorari).

After his release from the Terrell State Hospital Petitioner was convicted of about 24 additional theft offenses (R 62, 73). During the trial on the merits of the case the Defendant's attorney stated that an indictment was introduced which showed that Petitioner

had been convicted or charged in 10 or 15 thefts or theft related cases (R 137). One of the State exhibits printed in the record is an indictment which alleges two previous convictions (R 143).

Petitioner had resided with and worked for the victim of this crime for about four months prior to the date of the offense which took place on October 21, 1960 (R 75, 77). The Defendant was arrested in possession of the stolen coins on October 22, 1960, in Hurst, Texas, (R 94, 95). On October 25, 1960, Petitioner accompanied the sheriff of Ellis County, Texas, to a remote area near Arlington, Texas, and directed the sheriff to the location of the metal box in which the victim had kept the coins which were stolen (R 101). At the scene to which Petitioner had directed him, the sheriff discovered burned coins, the burned remains of the collector's albums into which the coins had been placed by the victim, and the burned remains of other papers which had been in the metal box in which the coin collection had been kept (R 101). On November 3, 1960, the Petitioner was taken to the office of Dr. John Compton, the Ellis County Health Officer, and examined for lunacy by Dr. Compton (R 57, 134, 135). Dr. Compton found the Petitioner to be sane, i.e. that he could distinguish right from wrong both at the time of the examination and at the time of the offense, October 21, 1960 (R 57, 59).

Thereafter, on February 7, 1961, the indictment on which Petitioner was subsequently tried was returned by the Ellis County Grand Jury (R 1-3). The trial was set for April 24, 1961, and on about April 2, 1961, the Court appointed an attorney to represent Petitioner (R 34). On April 21, 1961, Dr. Compton, the Ellis County Health Officer, examined the Petitioner at the

Ellis County jail and again concluded that he was of sound mind (R 57, 59, 135). On the same date, which was only three days before the trial date, the Petitioner's attorney made two motions. In each he recited Petitioner's prior adjudication of lunacy and alleged that Petitioner was a pauper. In the first motion he asked that Petitioner be sent to a mental hospital for diagnosis and observation before the trial (R 3-4). In the second motion he asked that the Court appoint and pay for the services of "a competent independent psychiatrist" (R 5-6). Both motions were refused.

Under Texas law the accused in a criminal case has the right to have a pre-trial hearing on the question of whether or not he is insane at the time of the hearing or was insane at the time of the offense for which he is being tried.

On April 24, 1961, such a preliminary hearing was held at the request of Petitioner (R 6). At this preliminary hearing, the State had the duty of proving beyond a reasonable doubt that the Petitioner was sane at the time of the offense and at the time of the hearing, because, under Texas law, the 1924 adjudication raised a continuing rebuttal presumption of insanity (R 7-8).

Among the testimony offered by the State at the preliminary hearing was the testimony of Dr. Compton, the County Health Officer (R 57-65). Dr. Compton testified that he was a physician of some six years experience in the practice of medicine (R 57). He testified that he examined Petitioner on November 3, 1960, in his office and on April 21, 1961, in the county jail (R 57). Dr. Compton expressed the opinion that the Petitioner was of sound mind and oriented as to time,

place, and person on the date of the offense, on the date of the examinations and on the date of the preliminary trial (R 57-58). He testified that, at his first examination, he took Petitioner's medical history and examined him on his mental capacity to ascertain if he was oriented and if he was having any difficulty with hallucinations (R 58). Dr. Compton further testified that his examination consisted of questions in reference to the Respondent's name, his birthdate, his age, (to see if they corresponded, his age with the right year), questions as to the location where he was, the place, the time, the date, the month, the year; generalities as to who was President of the United States and Governor of Texas; his past medical history, if he has had any serious illnesses; as to any hallucinations, (hearing voices, seeing things that were not actually there); questions as to any paranoid tendency, (a feeling of everybody being against him or any threats to him); questions as to his schooling, how far he went in school; simple mathematical problems to see if he was able to keep a train of thought; questions intended to test his mental ability and thought processes (R 63). Dr. Compton, whose studies in medical school included psychiatry (R 64) and who treats patients with emotional problems in his private practice (R 136) further testified that, in his opinion, it was not necessary for a more thorough examination of Petitioner to be conducted by a psychiatrist or psychologist in order to eliminate the possibility that Petitioner might be insane (R 63). Dr. Compton further testified that he was using the word "insane" as meaning unable to distinguish right from wrong (R 69). In response to questions from the defense Dr. Compton also testified at length about the nature of kleptomania and mental illnesses generally (R 59-64). Specifically, in relation to

kleptomania, Dr. Compton testified that generally, kleptomaniacs regularly steal things that they do not need. That they will go routinely into stores and take things that they do not need and, having stolen those things just put them up and never use them (R 62). Dr. Compton further testified that, in his opinion, Petitioner is not a kleptomaniac (R 64).

At the conclusion of Dr. Compton's testimony a discussion was had between the Court and counsel which established that the State had two or three more witnesses to call and the defense counsel made the following motion: "Your Honor, in view of this, I would like to make the motion that the Court recess in order to allow a doctor we have got to examine this man and who hasn't had the opportunity before, to check with him, possibly over the lunch hour. He just came in." (R 65). The Judge indicated his approval of counsel's request and the Court apparently recessed for not less than a 45 minute lunch period (R 65). After the recess the prosecution called two more witnesses (R 65-68), both of whom were laymen and both of whom testified that from their observations, they thought that Petitioner was of sound mind both at the time of the preliminary hearing and at the time of the offense (R 66-68). The State having rested, the defense called as its first witness Dr. James A. Dyal, an Assistant Professor in psychology at Southern Methodist University. (R 68). Dr. Dyal testified that he has a Ph.D. degree in psychology from the University of Illinois and has done clinical work dealing with mentally deranged persons (R 68-69). So far as the record reflects Dr. Dyal is not a physician nor is he licensed to practice medicine. Dr. Dyal testified that he had examined the Petitioner in a 20 minute interview (R 69, 70). Dr. Dyal

further testified that his examination was not adequate for him to form an opinion about the Petitioner's mental condition (R 69, 70). The record does not reflect when Dr. Dyal examined Petitioner, where the examination took place, nor why the examination consisted of only a 20 minute interview. Dr. Dyal then testified as to what, in his opinion, would constitute an adequate examination in order to determine whether an individual is "insane" or not (R 70-72). Dr. Dyal further testified that a kleptomaniac is a mentally ill person and that ". . . typically a person who is a kleptomaniac steals because he cannot keep from stealing and does not attempt to turn whatever he steals into gain for himself." (R 73). Dr. Dyal testified that he did not find any symptoms of mental illness in Petitioner and that, in his opinion, no one could make such a decision based on such a brief examination (R 73-74).

At the conclusion of Dr. Dyal's testimony, Petitioner's attorney called the victim, Mr. L. C. Hackler, as his next witness (R 75). The victim testified, to the obvious surprise of the defense attorney, that, in his opinion, the Petitioner could distinguish right from wrong at the time of the theft (R 75, 77). At the conclusion of the victim's testimony both the State and the defense announced that they were finished with the presentation of evidence (R 78). The Court then properly instructed the jury as to their duties and instructed them that the Defendant was presumed to be insane until his sanity was shown by the evidence beyond a reasonable doubt (R 7). The Court also instructed the jury as to the legal definition of insanity and furnished them with appropriate forms on which to return whatever verdict they decided to render (R 7-8). The jury returned a verdict finding that the Peti-

tioner was sane both at the time of the offense and at the time of the pre-trial hearing (R 8). Thereafter, the Court entered an appropriate judgment on the verdict (R 9).

The next day the trial on the merits commenced with an opening statement by the defense attorney to the jury that the Petitioner's answer to the indictment would be a plea of not guilty by reason of insanity at the time of the offense and insanity at the time of the trial (R 91-92). The evidence for the State was similar to that which was introduced the day before and established beyond doubt that the Petitioner had stolen a coin collection of a value of approximately $600 from the victim, Mr. L. C. Hackler; and that the Petitioner was the same person who had been previously convicted of two non-capital felony offenses (R 92-126).

The defense recalled the victim, Mr. L. C. Hackler, who again reiterated that he thought that the Petitioner did know right from wrong (R 128). After a recess during which defense counsel conferred with a witness, (R 129) the defense called a Mr. P. L. Simms who had been one of Petitioner's employers (R 130). In response to the defense question about whether he thought Petitioner might be mentally defective, Mr. Simms expressed an opinion that Petitioner was not mentally defective (R 131). The defense did not recall Dr. Dyal nor does the record reflect why he was not recalled.

The defense then made a motion that the Court suspend the proceedings until "we send this man to a mental institution for closer observation, or in the alternative we would move that the Court appoint a psychiatrist or psychologist, somebody competent in men-

tal defects to examine this defendant and evaluate his mental condition in view of the previous conviction of the judgment of insanity." (R 131). The Court offered to appoint the County Health Officer and when the defense counsel indicated that he would not be satisfied with the appointment of anyone except a psychologist or psychiatrist, the Court overruled the motion. (R 131).

After the defense rested, the State introduced the judgment from the sanity hearing which had been conducted the previous day (R 134) and introduced evidence of the Petitioner's sanity similar to that which had been introduced the day before with the exception that one of the laymen who had testified the day before was not recalled and the jailer, who had not testified the day before, was called and expressed an opinion that the Petitioner was sane (R 124-125). Dr. Compton again testified about his examinations of Petitioner and again expressed his professional opinion that Petitioner was of sound mind (R 135). He further testified that the examination that he had given Petitioner was the same psychiatric examination that a psychiatrist or psychologist would give (R 135). He further testified that he had much occasion to treat the diseases of the mind and actually diagnose psychiatric patients (R 136). He also testified that the type of examination he gave Petitioner would detect a number of different types of mental illness (R 136). In answer to further questioning Dr. Compton testified that, applying the legal test of right and wrong he found no instance of Petitioner being of unsound mind and did not believe that further tests were necessary (R 138-139). Dr. Compton further testified that, when the Petitioner first came to his office for examination, he was brought

in from the jail for Dr. Compton to check him for insanity. (R 139).

Both sides having concluded their presentations the Court charged the jury on the elements of the offense, the burden of proof and their duty as jurors (R 11-15). The Court further charged the jury that under the law Petitioner was presumed to be insane; that the burden was upon the State to prove by legal evidence beyond a reasonable doubt that the Defendant was sane at the time of the commission of the offense and that he was sane at the time of the trial, before the jury would be warranted in finding that the Petitioner was of sound mind at either of said times; and that if the State failed to so prove then the jury was to find that the Defendant was insane at both times (R 15-16). The charge also cautioned the jury that they could not consider the failure of the Petitioner to testify as evidence against him and furnished them with appropriate forms for their verdict (R 16-17). After deliberation, the jury found the Petitioner sane both at the time of the offense and at the time of the trial; found that he was guilty of the offense with which he was charged and found that he had been previously convicted of two felony offenses less than capital (R 14, 16). Under the Texas law, the mandatory sentence upon such a conviction is confinement in the penitentiary for life and on April 25, 1961, judgment was entered and sentence pronounced (R 18-19).

Petitioner made a motion for new trial and perfected his appeal as recited in the last paragraph on page 5 of Petitioner's brief.

ARGUMENT

I.

UNDER THE FACTS OF THE INSTANT CASE THE STATE TRIAL COURT HAD NO DUTY TO APPOINT A "PSYCHIATRIST" OR OTHER SPECIALIZED TECHNICAL ASSISTANTS TO THE DEFENSE COUNSEL ON REQUEST.

It is undisputed that the State of Texas does not have any statutes which allow the trial court to appoint a specialist or other technical assistant to the defense counsel. In the case at bar, the very able and astute defense counsel, three days prior to the scheduled trial date, filed an unsworn motion signed by himself, alleging that the Petitioner was indigent and asking the court to "appoint and pay" for the services of an independent "psychiatrist" to make a pre-trial examination of Petitioner, and that the court suspend the proceedings until such time as the "psychiatrist" had completed his examination (R 5-6). The denial of this motion is now alleged to have constituted a deprivation of Petitioner's rights under the 14th Amendment to the Constitution of the United States.

In *United States ex rel. Smith v. Baldi*, 344 U. S. 561, 73 S. Ct. 391 (1953) this court had before it a case where the Petitioner contended that the failure of the Pennsylvania trial court to appoint a "psychiatrist" for him deprived him of due process. The trial court had before it the testimony of a "psychiatrist" who examined Smith at the request of the court and the testimony of two "psychiatrists" called by the defense. id. p. 568 U.S. In answer to Smith's contention that the trial court had a duty to appoint a "psychiatrist" to afford him adequate counsel the court said (at p.

568 U.S.): "We can not say the State has that duty by constitutional mandate. See *McGarty v. O'Brien*, 1 Cir., 188 F.2d 151, 155."

Not only is there no provision in the State law which allows the procedure requested by the Petitioner, (R 156-157) but the motion raised an even more fundamental problem by use of the word "psychiatrist." In Texas, a proper licensed physician can treat any disease, disorder or deformity by any means or method and, therefore, can become a "psychiatrist" simply by calling himself one (Article 4495-4512, Texas Civil Statutes). Under the Texas law psychiatrists are not separately licensed nor is there any definition of psychiatry or a psychiatrist in the Texas statutes. It will, therefore, be assumed for the purposes of this brief, that by the term "qualified psychiatrist" Petitioner's counsel meant a physician who was a fellow or member of the American Psychiatric Association.

II.

THE PETITIONER WAS ACCORDED AN ADEQUATE OPPORTUNITY TO ASSERT THE ISSUE OF HIS ALLEGED INSANITY AND WAS EXAMINED BY A QUALIFIED INDEPENDENT PHYSICIAN WHOSE SERVICES WERE AVAILABLE TO THE PETITIONER PRIOR TO HIS TRIAL.

That the State authorities treated the possibility of Petitioner being mentally incapacitated with considerable seriousness is clearly illustrated by the record. A few days after his arrest and return to Ellis County the Petitioner was taken from the jail to the office of Dr. John Compton, the Ellis County Health Officer who examined him to determine whether he might be

insane (R 57, 134, 135). This was no hurried examination and observation of Petitioner in a prison cell, without privacy or in the presence of an attorney; this was an examination performed by a licensed reputable physician whose legal duty includes the examination and treatment of prisoners in the county jail (Article 4427, Texas Civil Statutes). The County Health Officer, Dr. Compton, was a physician of some six years experience in the practice of medicine (R 57) whose studies in medical school had included psychiatry (R 64) and who has many occasions to diagnose and treat mental illness and psychiatric problems in his practice in Ellis County (R 64, 136, 57). The examination Dr. Compton administered was the same psychiatric examination that a psychiatrist or psychologist would give and it would detect a number of different types of mental illness including schizophrenia, a paranoid personality or other emotional difficulty (R 136-137). The attempt by Petitioner's counsel in their brief to cast Dr. Compton in the role of ignorance and vanity is wholly unsupported by the record and is an assumption based upon medical authorities whose stated requirements are far beyond those which Petitioner's own witness, Dr. Dyal, testified would be necessary to adequately determine Petitioner's sanity. A comparison of the testimony of Dr. Dyal as to what he felt an adequate examination would include (R 71) with the examination actually performed by Dr. Compton (R 58-63) reveals that virtually all of the tests Dr. Dyal described were actually performed by Dr. Compton on his pretrial examination of Petitioner. It cannot be said that, as a matter of constitutional law, the failure of Dr. Compton to be a member of the American Psychiatric Association and perform the two or three other tests

described renders him incompetent to testify as to his findings. It is the well established rule in the majority of jurisdictions that a physician is entitled to testify, as an expert witness, as to the results of his examinations even though he is not a *specialist* in treating the particular portion of the body or the particular disorder or disease about which he is testifying. See for example: *Parker v. Guenther*, 164 Atlantic 2d 152 (Supreme Court of Vermont 1960); *Shorer v. Iowa Lutheran Hospital*, 107 N.W. 2d 85 (Supreme Court of Iowa, 1961); *Angle v. Rand Express Lines, Inc.*, 168 A. 2d 423 (Superior Court of New Jersey, 1961); *Pawlowski v. Marino*, 1958 A. 2d 218 (Superior Court of New Jersey, 1960); *Wolfinger v. Frey*, 162 A. 2d 745 (Court of Appeals of Maryland, 1960); in Re: *Millar's Estate*, 345 P. 2d 1033 (Supreme Court of Kansas, 1959); *Pollard v. Howfield*, 170 F. 2d 170, (U.S. Court of Appeals D.C. Circuit 1948); *Sher v. De Haven et al.*, 199 F. 2d 777 (U.S. Court of Appeals, District of Columbia Circuit 1952).

Although Petitioner's brief attempts to brush aside the testimony of the laymen who expressed an opinion as to Petitioner's sanity, the Courts have long recognized that the testimony of even untrained laymen can be of considerable value in determining sanity where the witness has had prolonged and intimate contact with the accused. *Hopkins v. United States*, 275 F. 2d 155 (U.S. Court of Appeals D.C. Circuit, 1959) and *Carter v. United States*, 252 Fed. 2d 608 (U.S. Court of Appeals D.C. Circuit, 1956). It cannot be denied that the testimony of the victim, Mr. L. C. Hackler, (R 75, 126) and the testimony of Mr. P. L. Simms (R 130) meet the test laid down for the testimony of lay witnesses set out by the Court in *Carter v. U.S. id* p. 618.

The mere fact that in 1956, 32 years after Petitioner was committed for lunacy, the State of Texas adopted a constitutional amendment prohibiting commitment except on ". . . medical or psychiatric" testimony (Article I, Section 15(a), Texas Constitution) does not mean that a layman's testimony can never form the basis for a sanity verdict. In fact, in this very case, the Court of Criminal Appeals of Texas held that a defendant in a Texas criminal case may successfully plead insanity in bar to prosecution or as a defense or *as a bar to punishment* though the evidence may not be such as would authorize his commitment (R. 156).

III.

THE STATE OF TEXAS GAVE PETITIONER AMPLE OPPORTUNITY TO ASSERT HIS DEFENSE OF INSANITY.

Petitioner's mental condition was a matter of serious concern to the State's authorities from the time he was arrested for the offense at bar to the present date. Petitioner was examined by the County Health Officer shortly after his arrest and return to Ellis County and before he was indicted for the offense.

The trial court appointed an attorney to represent Petitioner even though Petitioner had been convicted of 24 offenses after his adjudication of lunacy which, under Texas law, meant that Petitioner had "clearly appeared sane" on 24 separate occasions (Article 501, Texas Code of Criminal Procedure).

Texas law provides for a pre-trial hearing on the question of sanity and, in the case at bar, Petitioner was accorded that right upon his attorney's request. At the hearing Petitioner's attorney was given a recess

to have a "doctor" examine Petitioner (R 65) and, despite the remoteness of the adjudication of lunacy, the jury was instructed that the State had the burden of proving Petitioner's sanity beyond a reasonable doubt (R 7-8).

On the day following the pre-trial insanity hearing, the trial of the cause on the merits was had and Petitioner was allowed to plead not guilty by reason of insanity both at the time of the offense and at the time of the trial (R 91). During the trial on the merits defense counsel moved that the proceedings be suspended and Petitioner be examined for insanity by a psychologist or psychiatrist "someone competent in mental defects" (R 131). The defense did not suggest the appointment of any one particular person to make this examination and the Court offered the services of the County Health Officer, Dr. John Compton, whose qualifications have been previously discussed (R 131). The defense declined the Court's offer and rested (R 131).

At the conclusion of the trial on the merits Petitioner was again accorded the full benefit of the presumption of insanity arising from his previous adjudication of lunacy. The Court instructed the jury that the burden was upon the State to prove Petitioner's sanity beyond a reasonable doubt and that Petitioner was presumed to be insane and the jury should so find unless they were convinced by the evidence beyond a reasonable doubt of Petitioner's sanity (R 15-16).

Even though Petitioner is presently confined in the Texas prison, he is still a subject of concern to the State. If, at any time, he is found to be mentally ill there is elaborate state machinery by which the prison psychiatrist can have him hospitalized (Article 932-1, Texas Code of Criminal Procedure).

IV.

THE RULE WHICH PETITIONER URGES THIS COURT TO ADOPT WOULD PLACE AN IMPOSSIBLE BURDEN ON THE STATE OF TEXAS AND COULD NOT BE ADMINISTERED.

The Texas law does not separately license psychiatrists nor does it define psychiatrists or limit who may call himself a psychiatrist.

There are, of course, a number of physicians who purport to be psychiiatrists, some of whom are certified in psychiatry by the American Board of Psychiatry and Neurology. At the present time there are about 399 "psychiatrists" practicing in Texas (*Mental Health Services*, a directory for Texas, 4th Edition, 1962-1963, prepared by the Division of Mental Health, Texas Department of Health, and the Texas Association for Mental Health). These 399 "psychiatrists" are located, however, in only 34 Texas counties. There are 220 Texas counties which still do not have a resident "psychiatrist" (*More Hands to Help*, published by Texas State Department of Health, Division of Mental Health, January 1963 copied herein as Appendix A). It would be impossible in the State of Texas to require the appointment of a "psychiatrist" to examine the Defendant in a criminal case tried in one of those remote counties. Admittedly, the State has a duty to furnish all the Constitutional safeguards regardless of the difficulty encountered but this illustrates that the Petitioner is advocating an impossible burden and Respondent respectfully submits that the Constitution does not require the State to bear such an impossible burden.

V.

THE EFFECTIVENESS OF PETITIONER'S COUNSEL WAS NOT IMPAIRED BY THE REFUSAL OF THE COURT TO GRANT HIS MOTION FOR THE APPOINTMENT OF A PSYCHIATRIST.

Three days before the scheduled Trial date, Petitioner made a motion that the trial court "appoint and pay for a competent independent psychiatrist's services so that the Defendant can adequately prepare his defense. . . ." This is not a case where a prosecution, calling upon the vast resources at its command, brought forth high priced expert testimony while denying the Defendant any form of assistance whatsoever. The record reveals that the State relied upon the testimony of a competent, reputable, independent physician whose official duties as County Health Officer, required him to examine and treat prisoners in the county jail. There is no showing in this record that Petitioner or his counsel requested the assistance of, or consultation with the County Health Officer. The record does not reflect any attempt by the Petitioner or his counsel to get the County Health Officer to perform any of the tests the absence of which Petitioner now contends renders the County Health Officer's testimony of no value. In fact, when the court offered to appoint the County Health Officer to make further studies of Petitioner's mental condition the offer was declined by the defense (R 131).

Despite Petitioner's solemn avowal before this court that the denial of court appointed technical assistance prejudiced the presentation of his case in the State trial court, a reading of the record illustrates that Petitioner's counsel did not seriously want the very tech-

nical assistance the absence of which he complains about here. At page 35 of Petitioner's brief it is asserted that it is "a principal of medical ethics that the indigent always have a call on a doctor for his free services." The record before this court does not reflect that the Petitioner's counsel made any attempt whatsoever to avail himself of any of the "free services" which he now so blandly asserts would be readily available to an indigent defendant. In fact, there is no showing whatsoever in the record that Petitioner or his counsel made any attempt to obtain the services of a psychiatrist or psychologist except by virtue of the motion made by the defense counsel three days before the scheduled trial date. In addition, however, when, at the pre-trial hearing, counsel moved the court to recess to allow a "doctor" that he had just obtained to examine Petitioner over the lunch hour (R 65). The court granted that request. After lunch the court reconvened, the prosecution presented two more witnesses and rested (R 65-68). The defense then called Dr. James A. Dyal, a psychologist and an assistant professor of psychology at Southern Methodist University who testified that he found no symptoms of mental illness or defect in Petitioner (R 73), and that he had been unable to form an opinion as to Petitioner's sanity because he had only interviewed Petitioner for twenty minutes at some unspecified previous time (R 69, 70). Dr. Dyal also testified that an adequate examination of Petitioner would consume "two or three hours of a psychiatrist's or psychologist's time . . ." (R 72). Instead of requesting the court to grant Dr. Dyal this additional time which, according to his own testimony, would have been sufficient for him to form an opinion as to Petitioner's sanity, the defense counsel chose to proceed with the hearing calling an additional witness

after the conclusion of the examination of Dr. Dyal (R 75, 78). If Petitioner's counsel seriously wanted Dr. Dyal to perform what he (Dr. Dyal) would have considered an adequate examination surely counsel would have requested the court to grant an additional recess for this purpose. Although Petitioner asserts in his brief that Dr. Dyal was "required" to make his examination over the brief luncheon recess, the record reflects that the defense asked for a recess over the luncheon period and the court granted it. In addition, there is no showing in the record that the Petitioner, who had been confined in the County jail, was not available for examination on a previous date if counsel had attempted to get Dr. Dyal from Dallas to examine Petitioner at that time. In fact, the record simply does not reflect that the recess was necessary since Dr. Dyal might well have been available to examine Petitioner previously if he had been requested to do so. One further aspect of the defense handling of Dr. Dyal and his testimony indicates further that defense counsel did not seriously desire his assistance or testimony. It is undisputed that the trial on the merits of this case was not until the next day. Dr. Dyal was obviously present in the court room up until the time he concluded his testimony and the only witness who testified after him was Mr. Hackler whose examination must have been brief because it only occupies four pages of the record (R 75-78). The record does not reflect that counsel made any attempt to have Dr. Dyal conduct an examination of Petitioner after the conclusion of the proceedings on the pre-trial sanity hearing nor is there any explanation in the record why he could not have done so had he so desired. Respondent submits that this entire conduct on the part of defense counsel was intended as a matter of trial tactics and shows that coun-

sel did not seriously feel the need for the assistance of Dr. Dyal. During the trial on the merits, the defense did not recall Dr. Dyal nor did the defense attempt to explain why Dr. Dyal had not examined Petitioner in the time between the pre-trial hearing on sanity and the trial on the merits, if in fact such an examination did not take place. During the trial on the merits, however, defense counsel did elect to move that the proceedings be suspended until the Petitioner could be sent to a mental institution for closer observation or that the court appoint a psychiatrist or *psychologist* to examine the Defendant. The court offered to appoint the County Health Officer (R 131) and counsel, knowing that the County Health Officer did not claim to be a "psychiatrist or psychologist," declined the offer (R 131). If Petitioner's counsel seriously desired the services of a psychologist, why didn't he make full use of the services which Dr. Dyal was obviously willing to render since he had driven from Dallas to Waxahachie, the site of the trial, and apparently would have been willing to make the full examination? If defense counsel seriously felt that the additional tests which Dr. Dyal described in his testimony (R 71), some of which had not been performed by Dr. Compton, were necessary to fully assess the Petitioner's mental condition, why didn't he request that the County Health Officer perform those tests when the Court offered to appoint the County Health Officer to make whatever examination and observation counsel referred to in his motion to suspend the proceedings?

The entire contention that Petitioner's sanity was seriously in issue in this case is the result of a unique feature of the Texas law which allows a judgment of lunacy entered 37 years before the trial to raise a con-

timuing presumption of insanity regardless of its remoteness and regardless of the fact that it does not indicate a permanent type of insanity but instead, recites that Petitioner has had a number of "attacks" of lunacy. In some jurisdictions the remoteness of the 1924 judication would have so materially weakened the presumption that it would have been practically neutralized, for example see: *Gulley v. Common-Wealth*, 284 Ky. 98, 143 S.W. 2d 1059 (1940); *Common-Wealth v. Calhoun*, 238 Penn. 474, 86 A. 472 (1913); *Langdon v. People*, 133 Ill. 382, 24 N.E. 874 (1890); *People v. Maynard*, 347 Ill. 422, 179 N.E. 833 (1932); and note 27 A.L.R. 2d p. 145 et seq. This Petitioner, however, has been uniformly accorded the full benefit of a presumption of insanity by the courts of Texas, having even obtained his release from the penitentiary on a writ of habeas corpus from the Court of Criminal Appeals of Texas because of the failure of a previous trial court to appoint an attorney to represent him. *Ex parte Bush*, 313 S.W. 2d 287 (Texas Criminal Appeals 1958).

The record in this case reflects that the Petitioner was accorded every possible protection to assure that he was able to present his defense. He was furnished counsel without showing he was indigent. Before trial, he was given a comprehensive psychiatric examination by a competent, experienced, licensed, independent physician whose legal duty was to examine him and treat him if he was ill. He was accorded a pretrial hearing on insanity, during which his counsel was given every opportunity to present any evidence of insanity and, at the conclusion of which, he was given the benefit of a stronger presumption of insanity than most jurisdictions recognize. At the trial on the merits

the next day he was again given every opportunity to present his defense, including the opportunity to request further examination by the County Health Officer.

Respondent respectfully submits that this Petitioner has been accorded every aspect of due process of law including adequate psychiatric examination.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted.

WAGGONER CARR
Attorney General of Texas

SAM R. WILSON
Assistant Attorney General

ALLO B. CROW, JR.
Assistant Attorney General

LINWARD SHIVERS
Assistant Attorney General
Capitol Station
Austin, Texas

BRUCE ALLEN
County Attorney
Ellis County
Waxahachie, Texas

Attorneys for Respondent

"EXHIBIT A"

MORE HANDS to HELP

TEXAS STATE DEPARTMENT of HEALTH

Division of Mental Health

Reprinted from
Texas Health Bulletin

MORE HANDS to HELP

The number of psychiatrists in Texas has increased dramatically this past year. The location of these psychiatrists, in relation to the State's population, is the subject of this report.

by
James Otis Smith
and
Fred R. Crawford
Mental Health Division

The number of psychiatrists practicing in Texas increased to a new high in September, 1962. A recent count, compiled by the research and epidemiology program of the State Health Department's Mental Health Division, indicates a total of 399 psychiatrists who are working in the State.

This total includes all psychiatrists listed in *Mental Health Services: A Directory for Texas, 1962*, published jointly by the Division of Mental Health and the Texas Association of Mental Health. The listing was confirmed by comparisons with the *List of Fellows and Members of the American Psychiatric Association, 1961-62, and the Directory of Medical Practitioners Authorized to Practice Medicine in Texas* compiled as of March, 1962. Also information was gathered from local communities in which psychiatrists practice.

In March, 1961, only 290 psychiatrists were known to be practicing in Texas.

Approximately 46 percent (187 doctors) of the 399 psychiatrists in Texas are known to be practicing in full-time institutional settings such as State or V.A. clinics and hospitals, military bases, clinics in college health centers, etc. The remaining 54 percent are in private practice.

Psychiatrists and the Texas Population

Although psychiatrists are located in only 34 of 254 Texas counties, these 34 counties contain roughly 66 percent of the total Texas population.

Institutional settings determine the location of the 46 percent of psychiatrists who practice in these areas. However, only four counties (Cherokee, Howard, Kaufman, and Kerr—all locations of a State mental hospital) have psychiatrists in institutional settings but none in private practice—and these four counties contain only one percent of the total State population.

The overall ratio of psychiatrists to the State's population in 1961 was one psychiatrist to 33,650 persons (290 psychiatrists contrasted with an estimated State population of 9,743,949.) Today, the estimated ratio of psychiatrists is one to 25,063 persons (399 psychiatrists contrasted with an estimated population in excess of 10,000,000).

The overall ratio for the entire United States population in September, 1961, was about one psychiatrist for 18,000 population. Texas is still below the national average of several years ago even with this recent increase of psychiatrists in the State.

It is encouraging to find that psychiatrists are in private practice in 30 Texas counties, and that 65 percent of the Texas population lives in these 30 counties.

Urbanization and Location of Psychiatrists

When counties are grouped on the basis of population size we find that the ratio of psychiatrists to population varies. Those counties containing the larger urban-industrial centers of the State, such as Dallas, Fort Worth, Houston, San Antonio and El Paso, claim the bulk of the State's psychiatrists. As a group, these counties have the most favorable ratio of psychiatrists to population.

As county population size decreases, the ratio of psychiatrists to population becomes less favorable. However, there are noticeable gaps in this pattern in Texas. Hidalgo County, for example, with a population of well over 100,000 still has no psychiatrist. Three other counties—Orange, Webb, and Brazoria (except that Beaumont, next to the Orange County line, has four)—with populations of 62,043, 66,529, and 78,080, respectively, also have no psychiatrists at this writing.

In Texas' most sparsely populated counties, considered as a group, the ratio of psychiatrists is one per 508,735 persons. For the group of counties between 25,000 and 50,000 population, the ratio decreases to one per 75,000 persons. In the third group of counties, those with populations ranging between 50,000 and 100,000, the ratio psychiatrists is one per 43,375 persons. And in the group of counties with populations ranging over 100,000, the ratio is one psychiatrist per 15,396 persons.

(These ratios are approximations because there are no current figures for the county populations as of September, 1962.)

What Does This Mean?

On the basis of these facts, it may be concluded that Texas has "more hands to help" than ever before to serve those citizens who are mentally ill. But, at the same time, the gross ratio of psychiatrists to the population is still unfavorable—compared to that of the nation.

In Texas there are still vast areas outside urban-industrial centers with

no psychiatric resources available. And finally, should the trend towards an increasing number of psychiatrists in Texas continue, we may look forward to a more adequate availability of psychiatric skills for Texans in the future.

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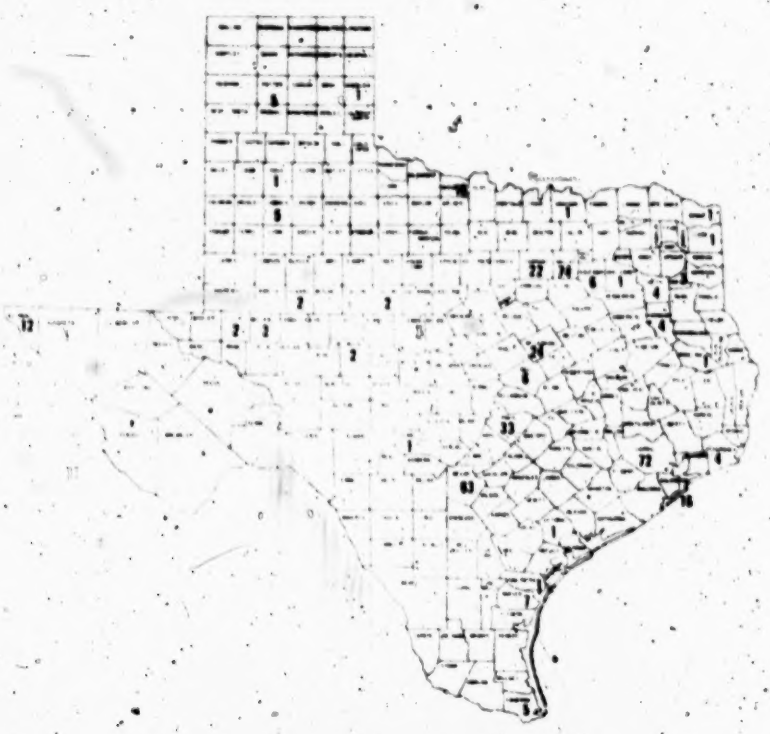

DISTRIBUTION OF PSYCHIATRISTS IN TEXAS
BY SIZE COUNTY AND PERCENT POPULATION, SEPTEMBER, 1962

County Size	Number of Counties	Per Cent of States Population[a]	Number of Counties with Psychiatrists[b]	Number of Psychiatrists	Per Cent of Psychiatrists in Counties	Ratio of Psychiatrists to Population
Below 25,000	192	20.9(2,034,939)	4	4	1.0	1:508,735
25,000-50,000	34	12.3(1,200,304)	7	16	4.1	1: 75,019
50,000-100,000	11	8.5(824,129)	8	19	4.8	1: 43,375
Over 100,000	16	58.3(5,684,577)	15	360	90.1	1: 15,790
TOTAL	253[c]	100.0(9,743,949)	34	399	100.0	1:24,421

[a]Source: Population Estimates for Texas Counties, April 1, 1961. Prepared by The Population Research Center, Department of Sociology, The University of Texas.

[b]Source: Mental Health Services: A Directory for Texas, 1962. Published by the Division of Mental Health, Texas State Health Department, and the Texas Association for Mental Health, Austin, Texas.

[c]For purposes of this analysis, Potter and Randall counties have been combined.